

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

DESHAY FORD, *Applicant*

vs.

**INSTITUTE FOR APPLIED BEHAVIOR ANALYSIS; INSURANCE COMPANY OF
THE WEST, *Defendants***

**Adjudication Number: ADJ11994903
Oxnard District Office**

**OPINION AND ORDERS
DISMISSING PETITION FOR RECONSIDERATION
AND DENYING PETITIONS
FOR CHANGE OF VENUE AND PETITION
FOR DISQUALIFICATION**

Applicant, in pro per, has filed several pleadings: a Petition for Change of Venue, filed on September 30, 2021; a Request to Move Trial Location/Petition for Disqualification, filed on October 8, 2021; a Petition for Change of Venue, filed on October 12, 2021; and a Petition for Reconsideration, filed on October 20, 2021. We have considered the allegations of petitioner's pleadings and the contents of the WCJ's report with respect thereto. Based on our review of the record, and for the reasons stated in the report, which we adopt and incorporate herein, we will deny the Petitions for Change of Venue and the Petition for Disqualification. We also dismiss the Petition for Reconsideration because there is no final order from which to seek reconsideration.

A petition for reconsideration may properly be taken only from a "final" order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.) A "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case" (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd. (Pointer)* (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd. (Kramer)* (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]) or determines a "threshold" issue that is fundamental to the claim for benefits. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) Interlocutory procedural or evidentiary decisions, entered in the midst of the workers'

compensation proceedings, are not considered “final” orders. (*Id.* at p. 1075 [“interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not ‘final’ ”]; *Rymer, supra*, at p. 1180 [“[t]he term [‘final’] does not include intermediate procedural orders or discovery orders”]; *Kramer, supra*, at p. 45 [“[t]he term [‘final’] does not include intermediate procedural orders”].) Such interlocutory decisions include, but are not limited to, pre-trial orders regarding evidence, discovery, trial setting, venue, or similar issues.

Here, the August 17, 2021 Minutes of Hearing is solely an intermediate procedural order. It does not determine any substantive right or liability and does not determine a threshold issue. Accordingly, it is not a “final” decision. Therefore, the petitions will be dismissed to the extent they seek reconsideration.

Finally, we address the request for disqualification. Labor Code section 5311 provides that a party may seek to disqualify a WCJ upon any one or more of the grounds specified in Code of Civil Procedure section 641. (Lab. Code, § 5311; see also Code Civ. Proc., § 641.) Among the grounds for disqualification under section 641 are that the WCJ has “formed or expressed an unqualified opinion or belief as to the merits of the action” (Code Civ. Proc., § 641(f)) or that the WCJ has demonstrated “[t]he existence of a state of mind ... evincing enmity against or bias toward either party” (Code Civ. Proc., § 641(g)).

Under WCAB Rule 10960, proceedings to disqualify a WCJ “shall be initiated by the filing of a petition for disqualification supported by an affidavit or declaration under penalty of perjury stating in detail facts establishing one or more of the grounds for disqualification” (Cal. Code Regs., tit. 8, former § 10452, now § 10960 (eff. Jan. 1, 2020), italics added.) It has long been recognized that “[t]he allegations in a statement charging bias and prejudice of a judge must set forth specifically the facts on which the charge is predicated,” that “[a] statement containing nothing but conclusions and setting forth no facts constituting a ground for disqualification may be ignored,” and that “[w]here no facts are set forth in the statement there is no issue of fact to be determined.” (*Mackie v. Dyer* (1957) 154 Cal.App.2d 395, 399, italics added.)

Here, the petition for disqualification does not set forth facts, declared under penalty of perjury, that are sufficient to establish disqualification pursuant to Labor Code section 5311, WCAB Rule 10960, and Code of Civil Procedure section 641(f) and/or (g). Accordingly, the request for disqualification will be denied.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DISMISSED** and the Petitions for Change of Venue and the Petition for Disqualification are **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 2, 2021

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

**DESHAY FORD
EMPLOYMENT DEVELOPMENT DEPARTMENT
GREENUP HARTSON
WEBSTER KAPLAN**

PAG/oo

*I certify that I affixed the official seal of the
Workers' Compensation Appeals Board to this
original decision on this date. o.o*

REPORT AND RECOMMENDATION
ON PETITION FOR DISQUALIFICATION

I

INTRODUCTION

DESHAY FORD, In Propria Persona, has filed a petition entitled “Petition for Change of Venue.” However, in consultation with the Presiding Judge of the Oxnard Office, the Presiding Judge determined that, in fact, applicant was seeking a remedy on grounds more akin to a Petition for Disqualification. As will be discussed below, if viewed as a Petition for Disqualification, it is un-timely. Also, there are no factual or legal grounds for the Petition for Disqualification. Lastly, it will be shown that there are no factual or legal grounds for a change of venue in this case.

To date, no answer to the Petition has been received. However, Defendant has filed an Objection to the Petition to Change Venue which could fairly be read as an Answer. In it, the defendant counters the events of the 16 September 2021 mandatory settlement conference (MSC) and counters the facts and circumstances of the case to support either disqualification or change of venue.

It is recommended that Disqualification be denied.

II

FACTS

Applicant, DESHAY FORD, aged 70 years on the date of injury while employed by the INSTITUTE FOR APPLIED BEHAVIOR ANALYSIS insured by the INSURANCE COMPANY OF THE WEST sustained an admitted injury arising out of and in the course of employment on 26 September 2018 to his right ankle. The injury occurred during an altercation with a student / patient.

On 02 July 2021, defendant filed a Declaration of Readiness to Proceed (DOR) that identifies the issues as permanent disability and future medical care. The case was set for a mandatory settlement conference (MSC) in front of another judge on 17 August 2021. The Minutes of Hearing of that date indicate that applicant’s attorney from the firm of Zapanta Alder thought

they were going to be dismissed as attorneys of record and the attorneys jointly requested a continuance. The matter was continued to 16 September 2021. Shortly thereafter, on 18 August 2021, the Board received a Dismissal of Attorney, dismissing applicant's former attorney. Thereafter, applicant has remained in propria persona. On 14 September 2021, applicant's former attorney filed an Amended Application adding hypertension and psyche to his case.

Importantly, the Board delegated service of the Minutes of Hearing of 17 August 2021 defense counsel. The endorsement of the Board secretary indicates this was done on 17 August 2021. The Minutes of Hearing of 17 August 2021 provided the continued date of 16 September 2021 and indicated that the undersigned was the assigned judge for this continued MSC.

On 18 August 2021, the defense counsel filed a Proof of Service bearing that same date, indicating service of those Minutes on the Applicant.

On 23 August 2021, defense counsel filed a proposed set of Stipulations and Issues, admitting injury and indicating that the issues were permanent disability, apportionment, future medical care, self-procured medical care and credit rights for duplication of benefits between temporary disability and EDD benefits. These issues remain unresolved.

On 16 September 2021, the parties appeared telephonically for the MSC. At that hearing, the Applicant stated that he wanted to try the 132a claim. The undersigned never stated that the Board is without jurisdiction to address this issue. However, the undersigned did state that the case-in-chief is usually tried first. The applicant also stated that he wanted to subpoena the perpetrator who attacked him, causing his injury. Defendant noted that this was not appropriate as the injury was an admitted injury. The undersigned stated that the Court would not permit subpoena of an unnecessary witness in an admitted-injury case.

At this point in the hearing, applicant accused defense counsel of being a racist. Defense counsel responded by saying (as he states in his Objection) that this is a claim that Mr. Ford often makes.

In any event, defendant wanted a trial but Mr. Ford's prior attorney filed an Amended Application that added hypertension and psyche to his claims. At this point, it was evident that further discovery was required so the undersigned granted applicant's request to go off-calendar. Defendant opposed that request but did not seek removal of the off-calendar order. Instead, applicant has filed this Petition for Change of Venue which is treated as a Petition for Disqualification.

III

DISCUSSION

The Applicant has filed two Petitions, both entitled Petition to Change Venue. One is dated 30 September 2021 and the other dated 05 October 2021. As noted above, while these Petitions are entitled Petition to Change Venue, the factual allegations assert claims that, if true, would constitute grounds for a Petition for Disqualification instead of a Petition for Change of Venue. In consultation with the Presiding Judge in Oxnard, the determination was made to treat these Petitions as a Petition for Disqualification. However, in the interest of completeness, the undersigned will discuss the Venue issue as well since the Appeals Board has the authority to decide either issue.

Before going on to the merits, first one must deal with the issue of timeliness. If these Petitions are viewed as Petitions for Change of Venue, then there is no issue as to whether or not they were timely because there appears to be no time deadline for a Petition to Change Venue under Labor Code § 5501.6. Here, while there is a deadline for filing for an objection to venue under Labor Code § 5501.5 appears to be no deadline for the Petition if it is for “good cause,” under section 5501.6. Since this is not an objection to venue, this appears to be a “good cause” petition under section 5501.6.

However, the factual assertions have little to do with venue, aside from the assertion that applicant believes he cannot get a fair trial in Ventura County. This assertion is made without any factual support, other than the fact that applicant states that he is African American and wants his trial to be in front of an African American judge. But not this is not remedy at law and there are no other facts that would support a change in venue.

To change venue, the moving party, Mr. Ford, has to show that there is good cause. The grounds for change of venue include the injury occurring in another county, the applicant or witnesses being residents of another county or that the defendant is located in that other county. In this case, there are simply no ties at all with Los Angeles County. The applicant lives in Oxnard, which is located in Ventura County. The injury occurred and the defendant is located in Camarillo, also located in Ventura County. Furthermore, the applicant has not alleged any of the witnesses are located in Los Angeles County. In fact, there has been no compliance at all with subpart (b) of

Labor Code § 5501.6. Therefore, if one were to treat this as a Petition for change of venue, no grounds are stated at all for change of venue, only the applicant's belief that he could not get a fair trial in Ventura County.

If, however, one views the Petition and the Amended Petition as a Petition for Disqualification, the timeliness issue becomes relevant. Under 8 CCR Rule 10960, applicant has ten days after service of a notice of hearing in which to file his Petition for Disqualification. Alternatively, he would have ten days from the date he became aware of the grounds for disqualification in order to file his Petition. In this case, the period of time would have expired on 02 September 2021 if one uses the deadline of ten (plus five) days from service of the Notice of Hearing indicating that the undersigned was assigned as the new MSC judge. Of course, the use of that deadline would assume that applicant had some factual data in advance of the hearing indicating that the undersigned should be disqualified.

If, however, the applicant learned of the facts disqualifying the undersigned on the day of the MSC, the deadline would be ten days from the date of the hearing since he was present for that hearing. Therefore, his right to file a Petition for Disqualification would have expired on 26 September 2021. This is because, the facts became "known" at that point in time.

One could argue that applicant may be entitled to an extra five days from the date of service of the Minutes. Since the Minutes were served by defense counsel on 24 September 2021, he would have until 12 October 2021 to file his Petition. However, that presupposes that the applicant's grounds for disqualification were contained in the Minutes of Hearing. They were not. Instead he alleges that the statements of the undersigned supported his assertion that both I and the entire Oxnard Board were racist. Since he was telephonically present at the hearing, the due date was 26 September 2021, ten days after the grounds for disqualification "are known." See 8 CCR Rule 10960. Therefore, the Petition viewed as one for disqualification, should be dismissed as untimely. However, even if the Petition and the Amended Petition are late, the nature of applicant's accusations require a response. The applicant claims that the undersigned stated that the Workers Compensation Appeals Board does not have jurisdiction to hear his 132a claim. This is not factually correct. The undersigned did say that the case-in-chief needs to be litigated or resolved first. This is because the value of the 132a claim is determined, in part, by the recovery in the case-in-chief. Trying the 132a claim would create a situation where there would have to be three trials instead of two. There would have to be a second 132a trial after the case-in-chief to determine the

value of the 132a. This is because the penalty is based on a percentage of the value of the case-in-chief. Trial of the 132a first would necessarily be incomplete as the penalty would have to await the conclusion of the case-in-chief in any event.

The applicant also states that the undersigned would not allow him to subpoena a particular witness. That is true, although the fact that applicant now asserts a psychiatric claim may change that analysis. When the undersigned believed this case to be an admitted right ankle injury, the undersigned did state it would not be appropriate to call that witness. However, when the undersigned learned of the Amended Application, the undersigned granted applicant's request for an off-calendar order to permit him to complete discovery. Depending on the facts of this case, it may well prove that the testimony of that witness might be relevant. However, one may question whether it may be a good idea to call that witness. That issue can be left for a future MSC and the undersigned has an open mind on the issue.

Applicant's next accusations are more serious. He alleges that the undersigned and defense attorney are engaged in "systemic racism" and that he did not believe he could get a fair trial in Ventura County. He also asserts that he does not feel safe going to a location in Ventura County. These accusations are without any factual basis. Without going into details of the personal and family history of this judge, it is enough to say that the undersigned is most definitely anti-racist in outlook. For an applicant who has had no prior contact with the undersigned to make that sort of accusation does not follow from any facts and is not a logical conclusion. The undersigned is not racist in outlook nor does the undersigned participate in any systemic racism. The undersigned has worked hard to assure fairness in Workers Compensation cases in general and takes seriously the Oath of Office to follow the Constitutions of both the United States and the State of California and to be fair and impartial in all matters.

The assertion that Mr. Ford feels unsafe reporting to a Ventura County location for trial is not logical. Not only does he live in Ventura County, he lives in the same city as the Court: Oxnard.

Applicant next argues that Los Angeles is a more diverse Board and that he wants to have an African-American judge. There are African-American judges at various Boards in the Division of Workers Compensation including Los Angeles. However, in a system where the judge is supposed to be a disinterested party, neither side has the right to choose the judge. Judges are assigned randomly to assure that neither side has an advantage. The undersigned was assigned randomly to this case.

If a judge is disqualified, another judge from the same location is usually appointed in his or her place. There are generally no grounds for disqualification of an entire District Office unless the party can show that each of the judges at that District Office was disqualified. More importantly, neither party has the right to choose a judge from the same racial or ethnic background as the party. Allowing one side to choose the race of the judge might, in itself, be systemic racism.

In sum, there was no racism or any other bias expressed nor implied at the MSC on 16 September 2021. There was disagreement between the parties over whether to set the case for trial and if the trial were set, whether a certain witness would be subpoenaed. However, once it was pointed out that applicant had amended his claim to include an injury to the psyche and hypertension, the undersigned granted applicant's request to take the case off-calendar for further discovery and denied the defendant a trial at this time. In other words, the applicant prevailed at the MSC of 16 September 2021.

In sum, the applicant has failed to show either grounds for disqualification of either the undersigned or the entire Oxnard office. He has also failed to state grounds for Change of Venue to the Los Angeles office.

IV

RECOMMENDATION

It is recommended that the Petition for Disqualification (entitled Petition to Change Venue) be dismissed as untimely. Alternatively, it is recommended that the Petition be denied.

Respectfully submitted,

ROGER A. TOLMAN, JR.
Workers' Compensation Judge